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SUPREME COURT OF [illegible]

OCTOBER TERM, [illegible]

No. 629

F. J. MARX,

Petitioner,

vs.

PERCY A. LAINSON, as Warden of the Iowa State Penitentiary,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA AND BRIEF IN SUPPORT OF PETITION

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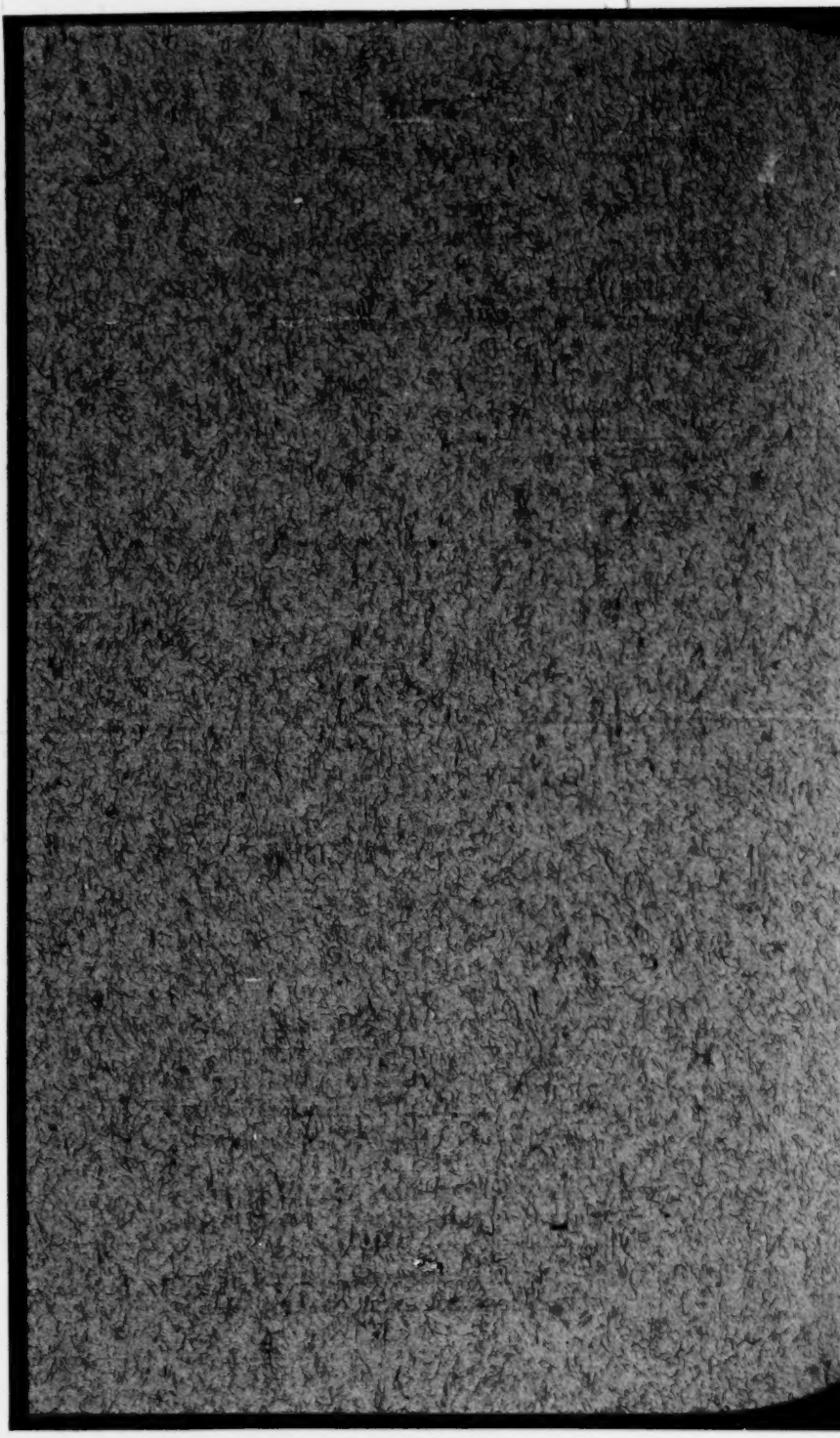

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 629

P. J. MART,

Petitioner,

vs.

PERCY A. LAINSON, AS WARDEN OF THE IOWA STATE PENITENTIARY,

Respondent

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petitioner, P. J. Mart, a prisoner in the Iowa State Penitentiary, at Fort Madison, Iowa, petitions this Honorable Court for a writ of certiorari to the Supreme Court of Iowa.

Statement of the Matters Involved

On June 30, 1947, P. J. Mart filed in the District Court of Lee County Iowa, a petition for a writ of *habeas corpus* (R. 3). The petition presented issues of jurisdiction and due process of law (R. 3-28).

Mart had theretofore been charged with the crime of assault with intent to commit murder in Pocahontas County,

Iowa (R. 17), and was under sentence of five years imprisonment following a conviction of assault with intent to commit manslaughter (R. 93). He was then, and is now, an inmate of the Iowa State penitentiary as the result of said conviction in Pocahontas County, Iowa (R. 74, 18-23). Percy A. Lainson, the respondent, is the warden of said penitentiary (R. 96, 5-6).

The writ of *habeas corpus* was issued (R. 28, 24-31) and a trial had in the Lee County court house before Honorable J. R. Leary, an Iowa District Judge, on July 7, 1947 (R. 29, 19-21). The petitioner contends he proved the material allegations of his petition for writ of *habeas corpus* by documents, oral evidence, and proffers of proof (Entire Record).

At the conclusion of the trial before Judge Leary of the Lee District Court, the Court found that the District Court of Pocahontas County had jurisdiction and the writ of *habeas corpus* was denied and the prisoner Mart remanded to the custody of respondent (R. 87, 1-16). An appeal to the Supreme Court of Iowa resulted in an affirmance of this judgment on January 13, 1948 (R. 162. Iowa 30 N. W. (2d) 305) resulting in this petition.

The altercation which resulted in the filing of a County Attorney's information against Mart in Pocahontas County, Iowa, charging him with the crime of assault with intent to commit murder (R. 87) occurred at his home, Sunday evening, October 29, 1944. It grew out of a dispute over the possession and use of a tractor plow. It is contended that Mart and one Loomis engaged in a fist fight. It is claimed that the petitioner stabbed Loomis in the back with a knife (R. 87-93). Mart was convicted of an included offense, assault with intent to commit manslaughter, which was submitted to the jury by the Pocahontas District Court (R. 93). The trial took place shortly after the alleged offense (R. 141, 25-31) and upon conviction Mart was taken

to the penitentiary (R. 94). He secured other counsel and appealed to the Supreme Court of Iowa (*State* v. *Mart*, 237 Iowa, 181, 20 N. W. (2d) 63).

In the *Mart* case appealed from Pocahontas County, Iowa, to the Supreme Court of Iowa, the opinion recites that the abstract of record shows no objections by defendant's counsel to any of the evidence or testimony; that no motion for a directed verdict was renewed at the close of the evidence; that no exceptions were interposed to the instructions to the jury; that there was no motion for a new trial; that counsel who represented defendant in this trial stated to the Court, "I will say again that from my view of the case that I do not think that the Court has made any error in its instructions or in the rulings of the evidence in this case, and I for one am not in favor of putting up to the Court propositions of law in behalf of a defendant *whom* I know in my own mind that I feel are not worthy of the Court's attention and I am not going to burden the Court with anything of that kind" (*State* v. *Mart*, 237 Iowa 181, 20 N. W. (2d) 63).

In addition to the foregoing which appears in the opinion of *State* v. *Mart*, 237 Iowa 181, 20 N. W. (2d) 63, the petitioner proved or offered to prove in the Iowa Lee County District Court that his counsel made no attack upon the information (R. 141, 1-22), no bill of particulars was requested (R. 141, 10-34), throughout the trial leading questions brought out prejudicial evidence against the defendant without objections (R. 122, 15-34; R. 123; R. 124, 1-30; R. 126, 13-34; R. 127; R. 128; R. 129; R. 130; R. 131; R. 132; R. 133; R. 134, 1-9), when objections were made by his counsel the same were withdrawn (R. 125, 1-17; R. 125, 21-34; R. 126, 1-9), no motion for a continuance was asked in order to prepare for trial (R. 141, 10-34), an available witness was not called (R. 75, 26-34; R. 76, 1-17), a landlord of one of the principal witnesses was left on the jury

(R. 129, 18-38; R. 145, 12), and a plea of insanity was not interposed (R. 141, 10-34; R. 142, 1-17; R. 16, 3-34; R. 17, 1-2).

Instead, his counsel further stated of record that a motion for a new trial was not filed due to the fact that he was firmly convinced the Court did not make any error in its instructions to the jury, further convinced of the fact the Court did not make any error in ruling upon evidence, and further convinced the defendant had a fair trial (R. 136, 14-24). When the Court indicated that no cause was shown why sentence should not be pronounced, his counsel replied, "No cause is known, Your Honor" (R. 138, 15-18).

The issues presented were due process of law and violations of petitioner's rights under the Fourteenth, Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

This Court Has Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. C. 344).

The Supreme Court of Iowa has decided questions involving the Fourteenth, Fourth, Fifth and Sixth Amendments to the Constitution of the United States in a way probably not in accord with applicable decisions of the Supreme Court of Iowa and the Supreme Court of the United States and has acted in utter disregard of them. (Revised Rules of the Supreme Court of the United States, 38(5)(a).) Only by certiorari proceedings herein can the petitioner obtain due process of law.

White v. *Ragen*, 324 U. S. 760, 65 S. Ct. 978, 89 L. Ed. 1348;

Ex parte Hawke, 321 U. S. 116, 64 S. Ct. 449, 88 L. Ed. 572.

The Questions Presented

I

Amendment 3 of the Amendments of 1884 to the Constitution of the State of Iowa is in conflict with the Fifth and Fourteenth Amendments to the Constitution of the United States.

Insofar as provision is made for holding persons to answer for any criminal offenses without the intervention of a Grand Jury, Amendment 3 is as follows:

> ". . . or the General Assembly may provide for holding persons to answer to any criminal offense without the intervention of a Grand Jury."
>
> *Adamson* v. *California*, 332 U. S. 46, 67 S. Ct. 1672, — L. Ed. —.

II

The County Attorney's information which was attacked by petitioner is as follows:

> "Comes now F. E. Van Alstine, as County Attorney of Pocahontas County, State of Iowa, and in the name and by the authority of the State of Iowa, accuses P. J. Mart of the crime of assault with intent to commit murder committed as follows:
>
> "And charges that the said P. J. Mart on or about the 29 day of October, A. D., 1944, in the County of Pocahontas and State of Iowa, did assault Harold Loomis, a human being, with intent to commit murder" (R. 87, 17-34; R. 88, 1-9).

The County Attorney of Pocahontas County verified this information stating "that I have made a full and careful investigation of the facts upon which the above charge is based, and that the allegations contained in the above and foregoing instrument are true as I verily believe" (R. 90, 24-34).

The petitioner contends that under decisions of the Supreme Court of the United States, he could not be imprisoned as a felon on such a foundation.

Albrecht v. *United States*, 273 U. S. 1, 47 S. Ct. 250, 71 L. Ed. 505;

Evans v. *United States*, 153 U. S. 584, 14 S. Ct. 934, 38 L. Ed. 830;

Lynch v. *United States* (C. C. A. 8), 10 F. (2d) 947;

Floren v. *United States* (C. C. A. 8), 186 Fed. 961.

III

Due process requires that there be opportunity throughout the trial to present every available defense.

American Surety Co. v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231.

IV

The petitioner also contends that he was sentenced for a crime which does not exist, assault with intent to commit manslaughter. No such a crime appears in the statutes of the State of Iowa. No common law crimes are recognized in Iowa. The conviction of Mart was a nullity.

United States v. *L. Cohen Grocery*, 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516;

Lanzetta v. *State of New Jersey*, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888;

Connally v. *General Constr. Co.*, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322;

Herndon v. *Lowry*, 301 U. S. 242, 278, 57 S. Ct. 732, 81 L. Ed. 1065;

Weeds v. *United States*, 255 U. S. 109, 41 S. Ct. 306, 65 L. Ed. 537;

International Harvester Comp[illegible] Kentucky, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. [illegible]

Neessen v. *Armstrong*, 213 Iowa 378, 386, 239 N. W. 56, 61;
State v. *Campbell*, 217 Iowa, 848, 251 N. W. 717;
State v. *Dailey*, 127 Iowa 652, 103 N. W. 1008;
Estes v. *Carter*, 10 Iowa 400;
Chapter 690, Code of Iowa, 1946;
Chapter 694, Code of Iowa, 1946;
State v. *Bunn*, 195 Iowa 9, 190 N. W. 155.

V

Section 777.18 of the Code of Iowa, 1946, is unconstitutional in that it forbade the petitioner at the trial showing insanity as a defense.

American Surety Co. v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231.

VI

The petitioner did not have assistance of counsel for his defense, in the trial in the Pocahontas District Court.

In this regard, it is also contended by petitioner that Constitutional provisions and decisions of the Supreme Court of the United States were disregarded by the Supreme Court of Iowa.

Finally, the Supreme Court of Iowa has disregarded his Constitutional right, and ignored it in a way not in accord with applicable decisions of this Honorable Court.

Rene De Meerleer, Petitioner, v. *The People of the State of Michigan, Respondent*, 329 U. S. 663, 67 S. Ct. 596, 91 L. Ed. 471;
Glasser v. *United States*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680;
Hawk v. *Olson*, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 61;
Williams v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398;

Palko v. *Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288;

Betts v. *Brady*, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595;

Powell v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158;

Smith v. *O'Grady*, 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859;

Adams v. *United States*, 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268;

Johnson v. *Zerbst*, 304 U. S. 458, 58 S. Ct. 1018, 82 L. Ed. 1461;

White v. *Ragen*, 324 U. S. 760, 65 S. Ct. 978, 89 L. Ed. 1348;

Tompkins v. *Missouri*, 323 U. S. 485, 65 S. Ct. 370, 89 L. Ed. 407;

Marino v. *Ragen*, No. 93, Oct. Term 1947, Dec. 22, 1947, — U. S. —, S. Ct. —, L. Ed. —.

Reasons Relied upon for Allowance of Writ

On July 7, 1947, in the trial of the *habeas corpus* case at Fort Madison, in Lee County, Iowa, District Judge J. R. Leary refused to permit the petitioner to introduce evidence materially showing that he did not have a fair trial, or any trial at all within the meaning of Constitutional law, the proceedings against him were a nullity, the Pocahontas County Iowa District Court did not have jurisdiction to sentence, Mart did not have assistance of counsel for his defense, the gross irregularities of the proceedings and trial, the denial of due process of law and material facts showing the foregoing (Entire Record). The petitioner was compelled to make a record by proffers of proof (R. 41, 27-34; R. 42, 1-12; R. 43, 1-8; R. 44, 11-15; R. 44, 25-30; R. 59, 10-20; R. 61, 30-34; R. 62; R. 63, 1-5; R. 64, 13-17; R. 65, 5-7; R. 65, 14-20; R. 66, 1-4; R. 66, 9-10; R. 67, 33-34;

R. 68, 1-10; R. 69, 28-34; R. 70, 1-26; R. 71, 23-30; R. 73, 1-11; R. 73, 31-34; R. 74, 1-2; R. 75, 11-25; R. 76, 12-17; R. 77, 8-17; R. 78, 1-3; R. 78, 15-19; R. 78, 29-34; R. 79, 23-34; R. 86, 7-16).

The Supreme Court of Iowa in affirming the dismissal of the *habeas corpus* suit, on January 13, 1948, reiterated the former conclusion expressed in *State* v. *Mart,* 237 Iowa 181, that the defendant had a fair trial and there was no prejudicial error which would warrant or require a reversal (R. 162, — Iowa —, 30 N. W. 2d 305), and without commenting upon the information verified by the County Attorney upon information and belief merely stated the information might be imperfect in sentence structure and diction but clearly was not so deficient that it failed to charge an offense under the laws of Iowa; that with reference to the question of due process of law not one of the many decisions of the Supreme Court of the United States cited by this petitioner in a voluminous brief were set out in the opinion or commented upon. This opinion is quite brief considering the printed record which contains 161 pages and a brief and argument of petitioner containing 132 printed pages. And without citing one decision of the Supreme Court of the United States, ignoring them, as we believe, the brief opinion ends as follows:

> "It is our conclusion that the trial court in the criminal case had jurisdiction, that the criminal proceedings were not violative of due process, that the judgment of conviction was not void and that he was convicted of a crime which is an included offense in the crime of assault with intent to commit murder, under the laws of this state. The judgment of the trial court is affirmed" (R. 165, — Iowa —, 30 N. W. 2d 305).

Many important factual matters were sought to be brought out in the trial before Judge Leary in Lee County

at the time of the *habeas corpus* suit on July 7, 1947, the dismissal of which was affirmed by the Supreme Court of Iowa as aforesaid (R. 162, — Iowa —, 30 N. W. 2d 305), including the proffered testimony of Margaret Mart, wife of the petitioner, who, as part of her verification in the petition for writ of *habeas corpus* had said, and offered to so testify, as follows:

> "That on the night of October 29, 1944, when Harold Loomis came to our home and engaged in an altercation with my husband on our back porch, I came to the door and saw my husband while on his hands and knees being struck by said Loomis twice on the back of the head and after my husband got up said Loomis struck him twice again in the head; that said Loomis struck him pretty hard two or three times; that the blows of said Loomis were heavy and on the head of my husband; that after my husband came back in the house I saw he had a scar over his left eye and a big lump on his right temple which was swollen up; that the skin was cut; that I taped it up with cotton and adhesive; that after coming into the house I noticed my husband was nervous and didn't say much; that he didn't act at all like his normal self; that he seemed to be in a daze or trance; that his eyes appeared glassy and he had a vacant look about them; that he complained of severe headache several times; that after going to bed he didn't sleep well; that he was restless and several times during the night got up; that knowing my husband as I do intimately, and knowing how he acted and appeared after the altercation with said Loomis, I am firmly convinced, and am of the opinion, the said blows he suffered on and about his head knocked him temporarily out of his mind and made him temporarily insane; that it was not until the next day my husband fully realized he had trouble with the said Loomis the night before" (R. 16, 4-34; R. 17, 1-2; R. 69, 28-34; R. 70, 1-27).

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of Iowa, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Iowa had in the case numbered and entitled on its docket, No. 47174, P. J. Mart, Appellant, *v.* Percy A. Lainson, as Warden of Iowa State Penitentiary, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Supreme Court of Iowa be reversed by the court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

CARLOS W. GOLTZ,
285-290 Orpheum Bldg.,
Sioux City 3, Iowa,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

The opinion was rendered by the Supreme Court of Iowa and filed January 13, 1948, in the case entitled P. J. Mart, Appellant, *v.* Percy A. Lainson, as Warden of Iowa State Penitentiary, Appellee, No. 47174, — Iowa —, 30 N. W. (2d) 305. The opinion is also printed in full in the record (R. 163).

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. C. 344). The Supreme Court of Iowa has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (Revised Rules of the Supreme Court, Rule 38(5)(a).)

Statement of the Case

On October 30, 1944, F. E. Van Alstine as County Attorney of Pocahontas County, Iowa, filed in the District Court of said county an information against the petitioner which reads as follows:

> "Comes now F. E. Van Alstine, as County Attorney of Pocahontas County, State of Iowa, and in the name and by the authority of the State of Iowa, accuses P. J. Mart of the crime of assault with intent to commit murder committed as follows:
>
> "And charges that the said P. J. Mart, on or about the 29th day of October, A. D. 1944, in the County of Pocahontas and State of Iowa, did assault Harold Loomis, a human being, with intent to commit murder" (R. 17; R. 33, 7-26; R. 87, 17-34; R. 88, 1-9; R. 30, 15-17).

On the back of the information, or the second page of it, the following unsigned words were set out as minutes of evidence:

"On behalf of the State, Harold Loomis will testify that at about 7:30 P. M. on 29 October, 1944, he went to the residence of P. J. Mart in Grant Township, Pocahontas County, State of Iowa, in company with Lyle Nieman, to get a plow which said Nieman had loaned to said Loomis; that after some discussion and without lawful provocation, P. J. Mart assaulted Harold Loomis; that there was a scuffle during which Mart bit and injured Loomis' right hand, after which Loomis broke free from Mart and started to leave; that Mart followed him and struck him in the back with a sharp instrument, inflicting a severe cut on the body of Harold Loomis (R. 88, 13-28).

"On behalf of the State, Lyle Nieman will testify that at about 7:30 P. M. on 29 October, 1944, he went to the residence of P. J. Mart in Grant Township, Pocahontas County, State of Iowa, in company with Harold Loomis to get a plow owned by the witness; that after some discussion, P. J. Mart assaulted Harold Loomis; that there was a scuffle during which both Mart and Loomis fell down, and that Loomis broke loose from Mart and got to his feet; that Mart got up and put his hand in his pocket; that Loomis turned and ran toward the gate and that Mart pursued Loomis; that Loomis was unable to get the gate open and vaulted over the fence and that Mart struck Loomis in the back just as he went over the fence; that Loomis went on out into the highway and Nieman then told Mart that they would take the plow and leave. Mart said 'You better take care of Loomis.' That Nieman got in the car and drove out in the road to Loomis and Loomis said, 'I'm bleeding.' That Loomis got in the car and Nieman drove to Pocahontas, to the residence of W. E. Gower, M. D. and took Loomis into the house and turned him over to Dr. Gower (R. 88, 29-34; R. 89, 1-18).

"Dr. Walter E. Gower of Pocahontas, Iowa, will tes-

tify on behalf of the State that shortly before 8:00 P. M. on 29 October 1944, Lyle Nieman brought Harold Loomis to his residence in Pocahontas, Iowa, and that Loomis was suffering from shock and loss of blood; that upon examination the witness found an open wound about four inches long in Loomis' back; that he removed Loomis' clothing and that Loomis' jacket, shirt and undershirt were cut directly over the wound and were bloody; that he sent Nieman after the sheriff and treated the wound and put Loomis to bed; this witness will qualify as an expert and will describe the wound in detail and will testify that he delivered the clothing above referred to to the sheriff (R. 89, 19-34; R. 90, 1-2).

"E. R. Stahly, Deputy Sheriff of Pocahontas County, Iowa, will testify on behalf of the State that he was called to the Gower residence in Pocahontas, Iowa, at about 8:00 P. M. on 29 October, 1944, and that Harold Loomis was there under the care of Dr. Gower with a severe cut in his back and with one finger on his right hand badly mangled; that Loomis stated to the witness that he had been stabbed by P. J. Mart; that the witness received a leather jacket, a shirt and an undershirt with a cut in the back of each and with blood on them from the doctor and that he has had actual possession of the same at all times since removing them; he will also testify that he examined the Loomis car and found a blanket spread over the front seat with blood on it, and that he took the blanket; the blanket, jacket, shirt and undershirt will be offered as exhibits" (R. 90, 3-20. Minutes of Evidence, Record, pp. 88-90).

The Iowa law requires that these purported minutes shall be read over to and signed by the witnesses (Code of Iowa, 1946, 771.12 and 769.12) which was not done.

On the last page, or page 3 of the information, it is verified by said F. E. Van Alstine as follows:

"I, F. E. Van Alstine, being duly sworn do depose and say that I am County Attorney of Pocahontas

> County, Iowa; that I have made a full and careful investigation of the facts upon which the above charge is based, and that the allegations contained in the above and foregoing instrument are true as I verily believe" (R. 33, 29-34; R. 34, 1-9; R. 61, 30-34; R. 62, 1-34; R. 63, 1-31; R. 90, 22-33; R. 91, 1-6).

And on said last page of the information, Judge Fred M. Hudson, one of the judges of the District Court of Pocahontas County, Iowa, granted leave to file said information and ordered the cause to be prosecuted by it in these words:

> "On this 30 day of October, A. D. 1944, Fred M. Hudson, Judge of the District Court, being satisfied from the showing made herein that this cause should be prosecuted by information, the same is approved" (R. 40, 13-31; R. 62, 18-24; R. 91, 8-14).

Judge Hudson fixed bail on this information in the sum of $10,000.00 and a warrant was issued for the arrest of appellant who was taken into custody thereunder by the sheriff of Pocahontas County, Iowa, on said date the information was filed, October 30, 1944 (R. 97, 1-32; R. 98, 1-4; R. 91, 27-31; R. 40, 13-31; R. 42, 4-6).

The trial of the petitioner under this information commenced at Pocahontas on November 20, 1944 (R. 141). No attack upon the sufficiency of the information was interposed (R. 141). A bill of particulars was not sought (R. 141). Left on the jury was the landlord of one of the principal witnesses for the State (R. 129, 18-28; R. 145, 12). Leading questions were asked throughout the trial without objections by counsel for petitioner (R. 122-124; R. 126-134). Material questions were asked by counsel for petitioner and withdrawn upon objections made by the County Attorney (R. 125, 1-17; R. 125, 21-34; R. 126, 1-9). No material objections were made to evidence offered by the State (R. 122, 15-34; R. 123, 1-34; R. 124, 1-30; R. 126, 13-34;

R. 127-134). A short motion for a directed verdict made at the close of State evidence was not renewed at the close of all the evidence (R. 74, 18-34; R. 75, 1-25). No exceptions were interposed to instructions (R. 143, 4-12). No motion for a new trial was made (R. 143). No reason was given why sentence should not be pronounced (R. 144, 22-24). Counsel for appellant stated:

> "* * * I for one am not in favor of putting up to the court propositions of law in behalf of a defendant whom I know in my own mind that I feel are not worthy of the court's attention, and I am not going to burden the court with anything of that kind" (R. 138, 9-14).

In the verification to the petition for a writ of *habeas corpus,* which facts the petitioner offered to prove but the court denied him the right to prove them during the trial of the *habeas corpus* case, Margaret Mart, wife of P. J. Mart, the petitioner, swore in part as follows:

> "I further depose and say that P. J. Mart was born in Palo Alto County, Iowa, November 3, 1890; (R. 64, 6-7) that he has spent all of his life in Iowa excepting when he was a soldier in World War I; (R. 64, 8-21) that on June 2, 1920, Mr. Mart and I were married at Pocahontas, Iowa; (R. 64, 22-23) that my maiden name was Margaret Neu; that I was born in Pocahontas County, Iowa, February 23, 1895; that I have lived in Iowa all my life; that except for the first five years of our married life when we lived near Emmetsburg, Iowa, we have lived in Pocahontas County since our marriage; (R. 64, 23-25) that we have always farmed; (R. 65, 21-22) that we have raised nine children, the oldest being 26 years of age and the youngest is 13 years old; (R. 64, 25; R. 65, 5-7) that there are five boys and four girls; that the two oldest boys were officers in the United States Air Corps during World War II; (R. 64, 26-34; R. 65, 5-7) that the oldest son is working in a retail department store at Spencer, Iowa; (R. 65, 5-7) that another boy is attending col-

lege at Ames, Iowa, taking a course in agricultural engineering; (R. 65, 5-7) two boys are farming at Pocahontas and the youngest boy, age 15, is attending school; (R. 65, 5-7) that our oldest girl, a nurse, recently married, now resides in New Jersey; (R. 65, 1-7) that another girl recently completed nursing training and is now a nun; (R. 65, 5-7) that the third girl is employed by an insurance company in Omaha, Nebraska, and the youngest daughter, age 13, is attending school; (R. 65, 5-7) that until Mr. Mart got into the present difficulty no one in our family had ever been arrested for any offense; that is to say the first time any of us, including Mr. Mart, was ever charged with a violation of a law of any kind was when Mr. Mart was arrested in this case; (R. 65, 8-20) that during our married life my husband and I have accumulated through hard work and diligent effort property which includes two farms of 160 acres each in Pocahontas County, Iowa; these farms are owned free of incumbrances; (R. 65, 23-34; R. 66, 1-4) all of our children have graduated from high school excepting the two youngest who are attending school; that my husband, P. J. Mart, is about five feet four inches in height and 57 years of age; (R. 66, 5-10) that during all of our married life his health has not been good; (R. 66, 11-15; R. 68, 6-17) that about 1924 he had his tonsils removed and a tooth extracted which resulted in blood poisoning to his entire system; (R. 66, 16-20; R. 68, 6-17) that he was in the hospital and laid up for several weeks as a result of this illness; (R. 66, 21-24; R. 68, 6-17) that about 1933 it was necessary for him to have a growth removed from his right foot; (R. 66, 25-29; R. 68, 6-17) this resulted in hospitalization and walking with the aid of crutches for over two months; that in 1935 he suffered a stroke; (R. 66, 30-34; R. 68, 6-17) that he was left with a heart ailment as a result of it and has been under doctor's care and orders to take things easy and not overexert himself since then; (R. 67, 1-7; R. 68, 6-17) that as our boys grew older my husband became more dependent upon them for help in operating the farm and doing the hard work; that my husband, P. J. Mart, has always

been a regular member of the church; (R. 67, 8-11; R. 68, 6-17) and that we attend Sacred Heart Church at Pocahontas; (R. 67, 12-14; R. 68, 6-17) that he does not smoke nor drink; (R. 67, 15-17; R. 68, 6-17) that he has never been in any trouble of any kind before this incident; (R. 67, 18-21; R. 68, 6-17) that he has always been the first to help any of his neighbors in need and has always been a peaceful, kindhearted man and a good law-abiding American citizen (R. 67, 22-34; R. 68, 1-17).

"I further depose and say as follows:

"That on the night of October 29, 1944, when Harold Loomis came to our home and engaged in an altercation with my husband on our back porch, I came to the door and saw my husband while on his hands and knees being struck by said Loomis twice on the back of the head and after my husband got up said Loomis struck him pretty hard two or three times; that the blows of said Loomis were heavy and on the head of my husband; that after my husband came back in the house I saw he had a scar over his left eye and a big lump on his right temple which was swollen up; that the skin was cut; that I taped it up with cotton and adhesive; that after coming into the house I noticed my husband was nervous and didn't say much; that he didn't act at all like his normal self; that he seemed to be in a daze or trance; that his eyes appeared glassy and he had a vacant look about them; that he complained of a severe headache several times; that after going to bed he didn't sleep well; that he was restless and several times during the night got up; that knowing my husband as I do intimately, and knowing how he acted and appeared after the altercation with said Loomis, I am firmly convinced, and am of the opinion, the said blows he suffered on and about his head knocked him temporarily out of his mind and made him temporarily insane; that it was not until the next day my husband fully realized he had trouble with the said Loomis the

night before" (R. 68, 18-34; R. 69, 1-34; R. 70, 1-34; R. 71, 1-10. Verification, Record, pages 13-17).

At the trial of this *habeas corpus* case before Hon. J. R. Leary, one of the Judges of the District Court of Lee County, at Fort Madison, Iowa, on July 7, 1947, the following proceedings were had:

Katherine Boozell, Clerk of the District Court of Pocahontas County, Iowa, a witness for petitioner, testified she was custodian of the files and records of that court and had the files and records in the case wherein Mart was convicted of assault with intent to commit manslaughter (R. 29, 23-34; R. 30, 1-2). She identified Exhibit "A", which is a certified copy of the information, minutes of evidence, judgment and sentence and first *mittimus* in the said Pocahontas County case (R. 30, 3-17). A copy of Exhibit "A" is attached to the petition for a writ of *habeas corpus* (R. 17-28). Exhibit "A" was received in evidence (R. 32, 6-34; R. 33, 1-6).

She identified Exhibit "B", the first page of the said information in the said case of *State of Iowa* v. *P. J. Mart*, No. 1071, Pocahontas County, Iowa (R. 30, 18-31). This exhibit was received in evidence (R. 30, 32-34; R. 31, 1-9). She identified Exhibit "B-1," the said minutes of evidence attached to information and it was received in evidence (R. 31, 12-34; R. 32, 1-4). She identified Exhibit "B-2," the last page of the information which contains the said verification of the County Attorney, leave of court to prosecute by information and order fixing bail, which was received in evidence (R. 33, 29-34; R. 34, 1-22; R. 34, 31-34; R. 35, 1-26; R. 40, 13-34; R. 41, 1-14; R. 44, 16-34; R. 45, 1; R. 56, 8-34).

She identified the unsigned judgment and sentence of petitioner by the Pocahontas County court which was also

received in evidence. This is Exhibit "C" in the record and is as follows:

> Dec. 2, 1944, Record Book 15, page 446.
>
> "Defendant appears in open court in person and with his attorneys, V. P. McManus and Glenn Gray, F. E. Van Alstine, County Attorney, appears for the State. The time for sentence having arrived the defendant is informed of the nature of the charge against him in the County Attorney's Information filed herein, his pleas thereto, and the verdict of the jury upon the trial and is asked if he had any legal cause to show why sentence and judgment should not be pronounced against him at this time.
>
> "Defendant says he has no legal cause to show why judgment and sentence should not be pronounced at this time.
>
> "It is therefore ordered and adjudged that the defendant is guilty of the crime of assault with intent to commit manslaughter and that said defendant be and he is hereby sentenced to be confined in the Men's Penitentiary at Fort Madison, Iowa, for a term of not to exceed five years at hard labor and pay the costs of this action.
>
> "Appeal bond fixed at $10,000.00" (R. 36, 1-34; R. 37, 1-17; R. 93, 19-32; R. 94, 1-11).

The witness was asked if she was present when Mr. F. E. Van Alstine signed the information, Exhibit "B-2". The respondent objected to the question and the objection was sustained (R. 35, 11-18). Exhibit "B-2" contains a signature also of Judge Fred M. Hudson and the witness was asked if she was present when Judge Hudson signed Exhibit "B-2" and an objection to the question was sustained (R. 35, 19-26).

The witness was asked to state whether or not both orders on Exhibit "B-2" were signed by Judge Fred M. Hudson, Judge of the District Court in and for Pocahontas County. She replied in the affirmative (R. 40, 13-31). The attention

of this witness was called to Exhibit "E," paper in the files entitled "Bench Warrant" and she was asked if it was the bench warrant issued in the Pocahontas County case. An objection was interposed by the respondent which was sustained. Thereupon the following record was made:

Mr. Goltz: We offer to prove by this witness at this time, that in pursuance to the order of Judge Fred M. Hudson, dated October 30, 1944, shown by Exhibit "B-2," which order is as follows: "On this 30 day of October, A. D., 1944, Fred M. Hudson, Judge of the District Court, being satisfied from the showing made herein that this cause should be prosecuted by information, the same is approved." Signed "Fred M. Hudson, Judge of the District Court."

And the further order: "Bail is hereby fixed on the within information in the sum of $10,000.00."

That in pursuance of those orders, this witness issued the Bench Warrant Exhibit "E," and we now offer in evidence Exhibit "E," being a Bench Warrant this witness did issue as shown by the record here before the court, in pursuance to said orders.

Mr. Johnson: Same objection as last above, and the further objection that it could not be material whether a Bench Warrant was or was not issued, or in what form it was issued.

The Court: Sustained. (Exception) (R. 40, 13-34; R. 41, 1-34; R. 42, 1-17).

The witness was asked concerning Exhibit "C", the purported judgment and sentence and regarding whether it had been signed by the judge (R. 37, 19-34; R. 38, 1-34; R. 39, 1-7). She said all District Court records were signed at the end of each term (R. 39, 10-15). She was asked to remember when George Mart, a son of petitioner, at the permission of Judge Hudson and in the presence of his reporter, and in her presence, examined the judgment in the case. The question was objected to and the objection

was sustained (R. 39, 16-27). She was then asked to tell where in Record Book 15, page 446 of the District Court of Pocahontas County, Iowa, appeared the signature of Judge Hudson. An objection to this question was also sustained (R. 39, 28-34).

Again the attention of the clerk, Katherine Boozell, was called to Exhibit "E", the bench warrant issued following the filing of said information by the county attorney. She was asked to state whether or not the Sheriff of Pocahontas County made the return on it. An objection was made to this question which was sustained (R. 41, 15-34; R. 42, 1-34). This record was then made:

Mr. Goltz: We offer to prove under the Bench Warrant, Exhibit "E", and in pursuance of the orders shown on Exhibit "B-2", this witness did issue the warrant as Clerk of the District Court, and that the same was turned over to the Sheriff of Pocahontas County and that he did arrest the defendant under said warrant, Exhibit "E" (R. 43, 1-8).

Attention of the witness was directed to the fact that under her certificate showing Exhibit "A" to be a true copy of the information there were neither names under "Names of Witnesses" nor was there a signature of the County Attorney under "A True Information"; that there now appeared to be names of witnesses as shown by the information, Exhibit "B-2" and signature of the County Attorney (R. 34, 31-34; R. 35, 1-18). She was asked whose writing appears on Exhibit "B-2" under that part of it entitled "A True Information" and "Names of Witnesses." This question was objected to and the objection sustained (R. 43, 12-26). She was asked if she knew whose handwriting it was in and an objection was made and sustained (R. 43, 26-34). This record was made:

Mr. Goltz: So there will be no question about it, we offer

in evidence Exhibit "B-2", being a page of the information and which contains the orders of Judge Hudson and the leave to file an information herein.

Mr. Johnson: In relation to your offer, you are not excluding therefrom the part of the same page bearing the signature of the County Attorney and the names of witnesses endorsed thereon, are you?

Mr. Goltz: That is rather mysterious to me. The certified copy we have doesn't contain them. You objected to me trying to find out what happened. We don't expect to be bound by what purports to be something on the back of the information under "A True Information," and "Names of Witnesses," but we do offer that part of it pertaining to the leave of filing the information and the court order.

Mr. Johnson: So long as there isn't any attempt to delete part of the page identified as an exhibit, which I don't think you would have a right to do anyway, there is no objection (R. 56, 8-21).

Katherine Boozell was asked if there were any other matters of evidence in the case other than that which appeared on plaintiff's (petitioner's) Exhibit "B-1." This was objected to and the court sustained the objection (R. 44, 1-10). Then the following record was made:

Mr. Goltz: We offer to prove by this witness that there are no other matters of evidence of any kind, and the only matters of evidence, if these be matters of evidence, are such as appear on plaintiff's (petitioner's) Exhibit "B-1" (R. 88-90; R. 44, 11-15).

The attention of this witness was directed to Exhibit "B-2" (R. 90-92) and to her signature "Katherine Boozell" thereon under the signature of F. E. Van Alstine and she was asked if there were any other persons present when Mr. Van Alstine signed Exhibit "B-2" before her as Clerk of the District Court of Pocahontas County, Iowa (R. 44,

16-22). An objection was made to this question which was sustained and the following record was made:

Mr. Goltz: We offer to prove by this witness that there was no other person present when that acknowledgment or swearing of the County Attorney of Pocahontas County, before her, as appears on Exhibit "B-2" (R. 44, 22-30).

The attention of the witness was called to the following in Exhibit "B-2":

> "*State of Iowa, Pocahontas County, ss.* I, F. E. Van Alstine, being duly sworn, do depose and say that I am County Attorney of Pocahontas County, Iowa; that I have made a full and careful investigation of the facts upon which the above charge is based, and that the allegations contained in the above and foregoing instrument are true as I verily believe. F. E. Van Alstine. Subscribed and sworn to by F. E. Van Alstine, before me, the undersigned, this 30 day of October, A. D., 1944. Katherine Boozell, Clerk of the District Court."

She was asked if she acknowledged the signature on that date of the County Attorney of Pocahontas County, Iowa. This was objected to and the objection was sustained (R. 34, 1-22).

Her attention was called to the Minutes of Evidence, or what purports to be Minutes of Evidence, plaintiff's (petitioner's) Exhibit "B-1" and an objection was made and sustained (R. 34, 23-30).

Her attention was directed to the two signatures of Judge Fred M. Hudson on Exhibit "B-2" and she was asked whether she was present when Judge Hudson signed same. An objection to this question was made and sustained (R. 35, 19-26). Thereafter the record is as follows:

Mr. Goltz: In view of the adverse ruling of the court, we offer to prove by this witness that no minutes of testimony were ever signed and sworn to before anyone in this case;

that the County Attorney merely signed the information as shown on the exhibit; that he merely then presented same to the court as is shown on the exhibits; and there are no other records and there was nothing else ever before the court, excepting what appears in the exhibits introduced here in evidence, or offered in evidence (R. 59, 10-21).

The witness identified all the files and records of the District Court of Pocahontas County, Iowa, in said case against Mart except the appearance docket and judgment lien docket, neither of which is material (R. 55, 9-24).

It was stipulated that P. J. Mart, petitioner, the appellant in the *habeas corpus* case, and P. J. Mart, defendant in the case of *State of Iowa* v. *P. J. Mart,* No. 1071, Pocahontas County, Iowa, was the same person (R. 56, 2-7).

F. E. Van Alstine, County Attorney of Pocahontas County, Iowa, was called as a witness for appellant (petitioner) (R. 59, 23-27).

Mr. Van Alstine stated he filed the information against Mart in Pocahontas County and his signature appears on plaintiff's (petitioner's) Exhibit "B"; that his signature also appears on the back of the information on the part the reporter marked Exhibit "B-2"; that he presented this information which had been marked by the reporter as Exhibit "B", "B-1" and "B-2" to Judge Fred M. Hudson (R. 59, 29-34; R. 60, 1-20). He was asked where Judge Hudson was when he presented the information for approval. This was objected to and the objection was sustained (R. 60, 21-25). He was asked if anyone was present when he presented the information to Judge Hudson for his approval. An objection was made to this question and the objection sustained (R. 60, 25-29). He was asked if any other evidence was presented to Judge Hudson excepting his verification that appeared on Exhibit "B-2". An objection was made to this question and it was sustained (R. 60, 29-34; R. 61, 1-6). He was asked if on the 30 day

of October, 1944 the day Judge Hudson gave him leave to file the information and prosecute by information, the day he swore to it on the information, Exhibit "B", before Katherine Boozell, the clerk, if there was any other evidence before Judge Hudson when he granted approval excepting the verification which appears on Exhibit "B-2". An objection to this question was sustained (R. 61, 7-21). He was asked if Judge Hudson took any other testimony or received any other evidence before he approved and permitted the filing of the information excepting that on Exhibit "B-2". An objection to this question was sustained (R. 61, 21-29). A record was then made as follows:

Mr. Goltz: Now, we offer to prove that the only thing Judge Fred M. Hudson had before him when he approved and permitted prosecution by information in this case, was this statement which appears on Exhibit "B-2" by this witness, F. E. Van Alstine, County Attorney of Pocahontas County:

> *"State of Iowa, Pocahontas County, ss:*
>
> "I, F. E. Van Alstine, being duly sworn, do depose and say that I am County Attorney of Pocahontas County, Iowa, that I have made a full and careful investigation of the facts upon which the above charge is based, and that the allegations contained in the above and foregoing instrument are true as I verily believe." Signed "F. E. Van Alstine."
>
> "Subscribed and sworn to by F. E. Van Alstine, before me, the undersigned, this 30 day of October, A. D., 1944. Katherine Boozell, Clerk of the District Court."

and upon that and that alone, Judge Fred M. Hudson made this order which appears on Exhibit "B-2":

> "On this 30 day of October, A. D., 1944, Fred M. Hudson, Judge of the District Court, being satisfied from the showing made herein that this cause should

be prosecuted by information, the same is approved. Fred M. Hudson, Judge of the District Court."

All of which we offer to prove if the witness were permitted to answer.

In other words, we offer to prove by this witness within the meaning of the following Iowa cases: *Burtch* v. *Zeuch*, 200 Iowa 49, *State* v. *Friend*, 206 Iowa 615, *Des Moines Drug Co.* v. *Doe*, 202 Iowa 1162, *Krueger* v. *Municipal Court of Sioux City*, 223 Iowa 1363, *State* v. *Doe*, 227 Iowa 1215; *State* v. *Gillam*, 230 Iowa 1287, that the information in this case, based on mere belief and unsupported by sworn facts, was approved and allowed to be filed when all that was before the court when it approved same was the County Attorney's statement that the allegations in the information were true (R. 61, 30-34; R. 62; R. 63, 1-5).

Thereupon the following is the record:

Q. So there will be no question about the record in this case, isn't what I have stated to the court in an offer to prove correct—there was nothing before the court except your affidavit which appears on Exhibit "B-2" to the effect you verily believed the statements therein contained to be true.

Mr. Johnson: Same objection as last above.

The Court: Sustained. (Exception.)

Mr. Goltz: May it please Your Honor: In each instance when an objection was sustained to questions propounded by the plaintiff, and an offer of proof was made, would the ruling of the court be the same if the questions were repeated after the offer of proof was made?

The Court: The ruling would be the same provided objections were made, Mr. Goltz, providing the same objection was made.

Mr. Goltz: Thank you. Would counsel make the same objections?

Mr. Johnson: If the same questions were asked, I would have (R. 63, 6-28).

In addition to the testimony of Margaret Mart which is as summarized in her verification attached to the petition for a writ of habeas corpus she gave further testimony for the appellant or offers of proof were made.

Mrs. Mart was asked if her husband had materially aided the witnesses Loomis and Nieman before the trouble. An objection was made and sustained (R. 67, 28-32). The following is the record:

Mr. Goltz: We offer to prove that prior to this trouble, the plaintiff (petitioner) had given material aid and assistance to Loomis and Nieman when they were up against it and in need of financial help that he aided them with horses, kept them at his place for them, loaned them machinery and otherwise helped them before this trouble.

We also offer to prove all that is alleged on pages two and three of the Verification attached to the petition for writ of *habeas corpus* in this case, about which we were interrogating the witness.

I assume if the questions were repeated, the same ruling would be made?

The Court: That is true, if the same objections were made.

Mr. Goltz: And I assume counsel would make the same objections?

Mr. Johnson: That is right (R. 67, 33-34; R. 68, 1-17).

Mrs. Mart was asked whether on the night of October 29, 1944, when Harold Loomis came to her home and the altercation followed if she saw her husband on the back porch of the house. She answered in the affirmative and stated Nieman came to the door of the house and asked for Mr. Mart (R. 68, 18-23). She was asked her whereabouts when she first saw her husband. An objection to this question was made and sustained (R. 68, 24-28). She was asked re-

garding seeing her husband on his hands and knees being struck by Loomis twice on the back of his head and an objection to this was made and sustained (R. 68, 29-34; R. 69, 1-3). This record was then made:

Mr. Goltz: So I can make the record the quickest way, we offer to prove by this witness that on the night of October 29, 1944, when Harold Loomis came to her home and engaged in an altercation with the plaintiff (petitioner) in this case on his back porch, she came to the door and saw her husband while on his hands and knees being struck by said Loomis twice on the back of the head; that after her husband got up, said Loomis struck him twice again on the head; that said Loomis struck him pretty hard two or three times; that the blows were heavy and on the head of the plaintiff (petitioner); that after her husband came back in the house she saw he had a scar over his left eye and a big lump on his right temple which was swollen up; that the skin was cut; that she taped it with cotton and adhesive; that after coming in the house, she noticed her husband was nervous and didn't say much; he didn't act at all like his normal self; he seemed to be in a daze or trance; his eyes appeared glassy and he had a vacant look about them; he complained of a severe headache several times; that after going to bed, he didn't sleep well, was restless, and several times during the night, got up; that knowing her husband as she does intimately, knowing how he acted after the altercation with Loomis, she was firmly convinced and of the opinion that the said blows he suffered on and about his head, knocked him temporarily out of his mind, made him temporarily insane; that it was not until the next day said husband fully realized he had trouble with said Loomis the night before. That, we offer to prove by this witness. Is counsel objecting to the offer of proof?

Mr. Johnson: I don't understand an offer or proof requires an objection. In the event the questions are asked

to elicit the information proposed and offered, the objection will be the same, incompetent, irrelevant, and immaterial to the issues in this case, will be advanced.

The Court: The court would sustain the objection.

Mr. Goltz: To all of it?

The Court: That is right. (Exception) (R. 69, 28-34; R. 70; R. 71, 1-4).

The witness was asked whether before the incident on the night of October 29, 1944, her husband had a lump on the back of his head. An objection was made to the question and sustained (R. 71, 5-10). She was asked if he still had a lump on the back of his head that he didn't have before the incident. An objection was made and sustained (R. 71, 11-14). She was asked if before the incident of October 29, 1944, her husband had complained of headaches and an objection was made and sustained (R. 71, 15-18). She was asked if he complained of headaches since that time. An objection was interposed and sustained (R. 71, 19-22). Then this record follows:

Mr. Goltz: We offer to prove by this witness, if permitted to do so, that before the assault or altercation or incident of October 29, 1944, her husband did not have a lump on the back of his head; that he has had one ever since then; that before that time, he did not complain of headaches; that he has complained of headaches ever since that time (R. 71, 23-30).

George Mart, a son of P. J. Mart, testified for the petitioner. He said he was twenty-one years old, married, had a son, worked on a farm belonging to petitioner; that he recalled the trial of his father at Pocahontas County where he was found guilty of assault with intent to commit man-

slaughter; that he was in court during all of the trial (R. 72, 1-12).

He was asked regarding obtaining permission from Judge Hudson following the trial to examine the record insofar as the permanent record in the District Court of Pocahontas County was concerned. An objection was made to this question and sustained (R. 72, 13-30). He was asked whether he examined in the office of the Clerk of the District Court of Pocahontas County, Iowa, record 15, page 446 concerning the sentence of his father and an objection was interposed and sustained (R. 72, 21-26). He was asked if this examination was made about March 1, 1947. An objection was made and sustained (R. 72, 31-34). This record then follows:

Mr. Goltz: We offer to prove by this witness that at the permission of Judge Hudson, who sent Mr. Kemis his court reporter down to be present, he examined Record Book 15, page 446 of the District Court Records of Pocahontas County, Iowa, being the purported Judgment and Sentence against his father, and that it was merely a handwritten entry containing the same records as are set forth in plaintiff's (petitioner's) Exhibit "C," and wasn't signed, and nothing else appeared excepting what is shown on plaintiff's Exhibit "C" (R. 73, 1-11).

George Mart was asked if he was in the courtroom at the time the State rested its case against his father. An objection was made and sustained (R. 73, 12-15). He was asked if he was sitting back of his father who was in turn sitting back of the attorneys for petitioner. An objection was made and sustained (R. 73, 16-20). He was asked if he had a conversation with his father concerning the renewal of a motion for directed verdict with the attorneys for petitioner at the time the State rested its case. An

objection was made and sustained (R. 73, 25-30). Then the record is as follows:

Mr. Goltz: We offer to prove by this witness that his father was sitting at the table with said attorneys, and he was back of his father; that his father turned to him and said, "The attorneys are going to renew the motion for a directed verdict." I assume again, if these questions were repeated, if asked, the ruling would be the same?

The Court: If the same objection were made, the ruling would be the same.

Mr. Goltz: Would counsel make the same objections?

Mr. Johnson: To questions eliciting that information, the objections would be the same (R. 73, 31-34; R. 74, 1-9).

P. J. Mart, the petitioner, testified in his own behalf and the following record was made:

Mr. Mart stated that he was the same P. J. Mart who was defendant in the Pocahontas case; that he was now in the Iowa State Penitentiary; that he was brought into court by the deputy warden of the Iowa State Penitentiary (R. 74, 13-23).

He was asked if at the time the State rested its case in the first instance if his attorneys made a motion for directed verdict. An objection was made and sustained (R. 74, 24-32). He was asked if at the time it was overruled he was told by his attorneys that the motion would be renewed at the close of all testimony. An objection was made and sustained (R. 74, 33-34; R. 75, 1-4). He was asked if when the State rested its case in its entirety and all testimony was in did he ask his attorneys to renew the motion for a directed verdict. An objection was made and sustained (R. 75, 5-10). The following then appears in the record:

Mr. Goltz: We offer to prove by this witness that during the trial of the Pocahontas case, when the State had first rested, he was told by his attorneys, or one of them, who appeared for him, that the court had overruled the motion for a directed verdict, but it would be renewed when all the testimony was taken; that when all the testimony was closed, he asked his attorneys, or one of them, to renew the motion for directed verdict, but it was not done; that he particularly asked to renew the motion for directed verdict as to two major charges which he had been informed would be submitted to the jury, assault with intent to commit murder, and assault with intent to commit manslaughter (R. 75, 11-25).

The witness testified he had another son besides George whose name is Walter; that he is fourteen years old. He was asked if Walter was home the night of the altercation. An objection was made and sustained (R. 75, 26-32). He was asked if he was home on the night of October 29, 1944, when the petitioner had trouble with Loomis. An objection was interposed and sustained (R. 75, 33-34; R. 76, 1-2). He was asked if he was present when the altercation took place. An objection was made and sustained (R. 76, 3-6). He was questioned whether he had asked his attorneys to put this son on the witness stand and did they refuse to do so. An objection was interposed and sustained (R. 76, 7-11). An offer of proof was made as follows:

Mr. Goltz: We offer to prove by the witness that the son mentioned in question was in court and the plaintiff (petitioner) here, the defendant in that case, asked these attorneys who represented him, or one of them, to put his son Walter on the witness stand, but they would not do so (R. 76, 12-17).

The petitioner was asked if after Loomis and Nieman had testified against him and the State had rested whether he asked his attorneys to put him back on the witness stand to explain further what had happened in the altercation. An objection was interposed and sustained (R. 76, 18-27). He was asked if it was for the purpose to explain or was it not for the purpose of explaining that Loomis approached him aggressively after making insulting remarks to petitioner and was in fact the person who started the trouble and was the aggressor that night. An objection was interposed and sustained (R. 76, 28-34; R. 77, 1-2). He was asked if it was his intention to testify and explain just how he had acted in self-defense that night. An objection was interposed and sustained (R. 77, 3-7). An offer of proof was made as follows:

Mr. Goltz: We offer to prove that this witness asked his attorneys, or one of them, for permission to go back on the witness stand so he could explain and testify further regarding the incident in the beginning, and that Loomis and not he, was the aggressor, and that he was in fact acting in self-defense, and Loomis made insulting remarks and approached him aggressively; that he had been threatened that morning by the wife of Loomis and felt he was in great danger from Loomis.

Mr. Goltz: If the questions were asked, would the rulings of the court be the same?

The Court: It would be the same if the same objections were made.

Mr. Goltz: Would counsel make the same objections?

Mr. Johnson: If the questions were to elicit the same testimony as proposed, the objections would be the same (R. 77, 8-26).

Mr. Mart was asked if his attorneys had advised him an appeal bond had been fixed. An objection was inter-

posed and sustained (R. 77, 27-34). He was questioned whether he asked the attorneys who represented him in the Pocahontas case about appealing to the Supreme Court of Iowa and an objection was made and sustained (R. 78, 4-8). He was asked if he had been told by them that he couldn't appeal the case to the Supreme Court of Iowa and an objection was interposed and sustained (R. 78, 9-14). Offers of proof were made as follows:

Mr. Goltz: We offer to prove he was not advised that an appeal bond had been fixed by the Court (R. 78, 1-3).

Mr. Goltz: We offer to prove by this witness that he talked to the attorneys who represented him in the trial at Pocahontas, or one of them, about appealing his case, and was told he could not do so (R. 78, 15-19).

After the conviction petitioner was sentenced to the penitentiary, immediately committed and remained there for eighteen days. Petitioner was then asked if this was the first time that he learned he had a right of appeal. An objection was interposed and sustained (R. 78, 20-28). This record was then made:

Mr. Goltz: We offer to prove by this witness that after he was sentenced, he was taken right to the Penitentiary and was in the Penitentiary 18 days, and there learned for the first time he had a right to appeal and then engaged counsel to appeal his case.

Mr. Goltz: If the questions were repeated, would the ruling of the Court be the same?

The Court: That is correct (R. 78, 29-34; R. 79, 1-3).

Petitioner was asked if he were struck on the back of his head, among other places, by Loomis that night in the altercation at his home, October 29, 1944, in Pocahontas County, Iowa. An objection was made and sustained (R. 79, 4-9). The following then appears of record:

Q. If your answer were "yes" to the preceding question, I would ask you, did you have any bump on the back of your head before the one put on by Loomis that night?

Mr. Johnson: Same objection as last above.

The Court: Sustained. (Exception.)

The Court: Pardon me, please. We might save time. Apparently it is your intention, Mr. Goltz, to ask the same questions asked the other witnesses, and attempt to retry the case. Why don't you go ahead and make your offer of proof and let the objection be made, and speed things up?

Mr. Goltz: We offer to prove, among the blows he received that night, was one to the back of his head which created a bump and which bump is still there; that he never had that bump before; that since that time he has had headaches at different times, a different type of headache than he ever had before; that it bothers him considerably and covers the entire area from back there through the center of his head, and he had been bothered with headaches from the time of the blow up to the present time.

Mr. Johnson: The proposed proof is objectionable for the reason same is incompetent, irrelevant and immaterial; having no bearing upon the issue entertainable in *habeas corpus*.

The Court: Sustained. (Exception.)

Mr. Goltz: There are many questions, if Your Honor please, but the Court's ruling, the statement concerning a retrial of the case is going to deter me from asking some of them, or any more. I have tried, however, only to ask questions which do not appear in the record. I am conscious of the fact we cannot try the case on its merits.

The Court: I am not trying to tell you what kind of a record you should make, Mr. Goltz. You go ahead and do whatever you want to do. I just thought we could speed it up in that manner (R. 79, 10-34; R. 80, 1-16).

Q. Mr. Mart, at about the time you were convicted and before your sentence, or, I will say, from the time of your conviction, the jury found you guilty and before sentence, were you sued by Loomis in a damage suit for $13,000.00?

Mr. Johnson: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained. (Exception.)

Q. If your answer is "Yes" to the preceding question, I will ask you, did you settle that damage suit? I will ask you whether you did or did not settle that damage suit with Loomis for $2,500.00?

Mr. Johnson: Same objection as last above.

The Court: Sustained. (Exception.)

Q. If your answer is that you did, to the preceding question, I will ask you, did you make that settlement on the advice of the attorneys who represented you in the trial?

Mr. Johnson: Same objection as last above.

The Court: Sustained. (Exception.)

Mr. Goltz: We offer to prove by this witness that after the jury returned a verdict, about that time and before he was sentenced, he was served with an original notice of suit in which Loomis was the complaining witness, asking $13,000.00 damages as a result of this altercation, and that on advice, and before his sentence, of counsel or attorneys or one of them who represented him in the District Court of Pocahontas County, Iowa, he paid said Loomis in cash the sum of $2,500.00.

Mr. Goltz: After this offer of proof if the same questions were again asked and counsel made the same objections, would the Court's ruling be the same?

The Court: That is correct.

Mr. Goltz: Would counsel make the same objections?

Mr. Johnson: Yes (R. 85, 19-34; R. 86, 1-24).

O. S. Neal, record clerk, Iowa State Penitentiary, called as a witness by respondent said he was sixty-four years old and had been employed as record clerk for twenty-five years; that he had the duty of receiving prisoners and receiving records including the *mittimus* when they were committed to the Iowa State Penitentiary at Fort Madison; that he had received the appellant (petitioner), P. J. Mart, as a prisoner in the institution; that he had with him the *mittimus* issued in the case; that Exhibit 1 was the *mittimus* he received at the time the petitioner, P. J. Mart, became an inmate of the Iowa State Penitentiary at Fort Madison; that P. J. Mart, the petitioner, is the same man he received under the *mittimus*; that petitioner was committed for five years (R. 80, 21-34; R. 81, 1-26). Exhibit 1 was offered and admitted in evidence. It is an exact duplicate of Exhibit "A", page 5 and page 5 continued, attached to the petition for the writ of *habeas corpus* (R. 81, 27-34; R. 23, 25-34; R. 24; R. 25, 1-13; R. 147, 19-23).

Exhibit 2 was identified by the witness as being transcript of judgment and sentence in the case of *State of Iowa* v. *P. J. Mart* in Pocahontas County, Iowa, which was delivered to him at the same time the *mittimus,* Exhibit 1, was received by him (R. 82, 1-8). Exhibit 2 was offered and received in evidence (R. 82, 13-16; R. 159, 22-34; R. 160; R. 161).

The witness received an order for the discharge of P. J. Mart on bond pending an appeal to the Supreme Court which was identified as Exhibit 3 (R. 82, 17-23). It was offered and received in evidence. Exhibit 3 is an exact duplicate of plaintiff's (petitioner's) Exhibit "M" (R. 82, 33-34; R. 83, 1-2; R. 147, 30-34; R. 104, 12-34; R. 105, 1-6).

The witness testified that he had the *mittimus* received following the disposition of the appeal of P. J. Mart to the Supreme Court of Iowa (R. 83, 3-9). It was identified as

Exhibit 4 and was offered and received in evidence. Exhibit 4 is identical with plaintiff's (petitioner's) Exhibit "R" (R. 83, 10-27; R. 148, 1-4; R. 106, 27-34).

The witness said it was by reason of the petitioner's exhibits introduced into evidence that the warden of the Iowa State Penitentiary was now holding the petitioner, P. J. Mart (R. 83, 28-31).

At the conclusion of the foregoing record in the Lee District Court a judgment adverse to the petitioner was made as follows:

> "The Court: I have read your brief, and the Supreme Court of Iowa has held this man has had a fair trial. I am afraid you are going to have to have them tell you they didn't have jurisdiction.
>
> "The court finds the District Court of Pocahontas County had jurisdiction, and the writ of habeas corpus will be denied and the prisoner will be remanded to the custody of the Warden of the Iowa State Penitentiary. (Exception.)
>
> "Mr. Goltz: At this time, we move the court to fix bail pending an appeal of this judgment. It will be appealed to the Supreme Court of Iowa.
>
> "The Court: The motion will be denied. (Exception.)" (R. 87.)

Errors Relied Upon

I

Amendment 3 of the Amendments of 1884 to the Constitution of the State of Iowa is in conflict with the Fifth and Fourteenth Amendments to the Constitution of the United States (R. 7).

II

The information against P. J. Mart in Pocahontas County, Iowa, failed to charge an offense and is a nullity (R. 17, 8-29; R. 87, 17-34; R. 88, 1-9). Leave of court to

prosecute by information was obtained without the showing of probable cause (R. 20; R. 90; R. 91). The District Court of Pocahontas County, Iowa, did not have jurisdiction (R. 3-28).

III

Due process requires that there be opportunity throughout the trial to present every available defense (R. 3-28).

IV

The petitioner was sentenced for a crime which does not exist, assault with intent to commit manslaughter. No such a crime appears in the statutes of the State of Iowa. No common law crimes are recognized in Iowa (R. 3-28; R. 93; R. 94; R. 159-161).

V

Section 777.18 of the Code of Iowa, 1946, is unconstitutional in that it forbade the petitioner at the trial showing insanity as a defense (R. 13-17; R. 69-71).

VI

The petitioner did not have assistance of counsel. It is a right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law (Entire Record).

The petitioner did not have assistance of counsel for his defense.

It is the contention of petitioner that if he had had the effective assistance of counsel at the trial in Pocahontas County, Iowa, the information would have been dismissed or he would have been acquitted thereunder; that his imprisonment resulted from the lack of effective assistance of counsel.

ARGUMENT

I

Amendment 3 of the Amendments of 1884 to the Constitution of the State of Iowa is in conflict with the Fifth and Fourteenth Amendments to the Constitution of the United States.

Insofar as provision is made for holding persons to answer for any criminal offenses without the intervention of a Grand Jury, Amendment 3 is as follows:

> ". . . or the General Assembly may provide for holding persons to answer for any criminal offense without the intervention of a Grand Jury."

Amendment 3 of the Amendments of 1884 to the Constitution of the State of Iowa.

Adamson v. *California*, 332 U. S. 46, 67 S. Ct. 1672, — L. Ed. —.

II

A. The information against P. J. Mart in Pocahontas County, Iowa, failed to charge an offense and is a nullity (R. 17, 8-29; R. 87, 17-34; R. 88, 1-9). Leave of court to prosecute by information was obtained without the showing of probable cause (R. 20; R. 90; R. 91). The District Court of Pocahontas County, Iowa, did not have jurisdiction (R. 3-28). A void judgment can be collaterally attacked by habeas corpus. This proposition is elemental.

The common law writ of error coram nobis is not recognized in Iowa.

Boyd v. *Smith,* 200 Iowa 687, 205 N. W. 522;
State v. *Harper,* 220 Iowa 515, 525, 258 N. W. 886.

This petitioner had no other remedy in Iowa excepting in *habeas corpus.*

The information against P. J. Mart in Pocahontas County, Iowa, failed to charge an offense and is a nullity (R. 17, 3-34; R. 18; R. 19; R. 20; R. 21; R. 22; R. 87, 17-34; R. 88; R. 89; R. 90; R. 91; R. 92; R. 93, 1-18). We refer to the information Exhibit "B" (R. 87, 17-34; R. 88, 1-9). It is as follows:

> "Comes now F. E. Van Alstine as County Attorney of Pocahontas County, State of Iowa, and in the name and by the authority of the State of Iowa, accuses P. J. Mart of the crime of assault with intent to commit murder committed as follows:
>
> "And charges that the said P. J. Mart, on or about the 29th day of October, A. D., 1944, in the County of Pocahontas and State of Iowa, did assault Harold Loomis, a human being, with intent to commit murder.
>
> "F. E. Van Alstine,
> "County Attorney."

Please take note that Mart is accused of assault with intent to commit murder "committed as follows"; and nothing follows (R. 87, 30-34; R. 88, 1-2).

Then another charge is made, "And charges that the said P. J. Mart • • • did assault Harold Loomis, a human being, with intent to commit murder," without showing who it was that he had intended to commit murder upon (R. 88, 3-9). In the Case of *State* v. *Schrup,* 229 Iowa 909, 295 N. W. 427, the Supreme Court of Iowa has held the necessity of charging the essential elements of a crime, and a plea of guilty to an information which does not charge an

offense did not confess a crime by such plea. It follows that a conviction under an information which does not charge an offense is a nullity (R. 87, 17-34; R. 88, 1-9).

Evans v. *United States,* 153 U. S. 584, 587, 14 S. Ct. 934, 936, 38 L. Ed. 830;

Lynch v. *United States* (C. C. A. 8), 10 F. (2d) 947;

Floren v. *United States* (C. C. A. 8), 186 Fed. 961.

In the case of *Floren* v. *United States, supra,* the learned Judge Sanborn held:

> "The office of a bill of particulars is not to make a bad indictment good, but to grant to a defendant who faces a good indictment further information to enable him to meet it."

Judge Sanborn further said, "The Supreme Court has never departed from this declaration of the law which it made in *Evans* v. *United States,* 153 U. S. 584, 587, 14 Sup. Ct. 934, 936, 38 L. Ed. 830." Judge Sanborn quoted from *Evans* v. *United States,* as follows:

> "Even in cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates" (R. 87, 17-34; R. 88, 1-9).

B. Leave of court to prosecute by information was obtained without the showing of probable cause (R. 20; R. 90; R. 91), and the District Court of Pocahontas County, Iowa, did not thereby acquire jurisdiction (R. 90, 22-34; R. 91, 1-15; R. 44, 1-30; R. 59, 10-20; R. 61, 30-34; R. 62, 1-34; R. 63, 1-5).

The verification upon which the County Attorney obtained leave of court to prosecute by information is not sufficient. The affiant merely recites "that the allegations contained in the above and foregoing instrument are true, as I verily believe" (R. 90, 23-34). The petitioner was arrested on a warrant following the filing of this information (R. 97).

If the Iowa Pocahontas County District Court had the power to approve the information it would have to find there existed probable cause of guilt of the crime charged before granting leave to file same as a foundation for the trial of defendant thereunder. There was nothing before the court excepting hearsay and the mere conclusion of the County Attorney.

A mere conclusion is insufficient either in the affidavit or the complaint. *United States* v. *Kaplan,* 286 Fed. 963, 969. The court said the evidence must be such "as would be admissible upon the trial of a case before a jury."

"Reasonable grounds to believe and does believe" is not sufficient foundation to find probable cause. *Staker* v. *United States,* 5 F. (2d) 312.

Please bear in mind that the so-called minutes of evidence all were unsigned and there was nothing before the court excepting the belief of counsel (R. 87, 17-34; R. 88; R. 89; R. 90; R. 91; R. 92; R. 93, 1-18).

In the case of *Wagner* v. *United States,* 8 F. (2d) 581 (C. C. A. 8) an affidavit "made on the personal knowledge of affiant" by reason of having in his possession a formal affidavit made by a police officer was held insufficient on which to base a finding of probable cause.

Finding of probable cause must be based on facts, and not suspicions, beliefs, surmises or mere conclusions. *Wagner* v. *United States, supra.*

The case of *United States* v. *Illig,* 288 Fed. 939 has been cited in the recent case of *United States* v. *Johnson,* 43 F. Supp. 167, at p. 172.

The case of *United States* v. *Quaritius,* 267 Fed. 227, is cited with approval by the Circuit Court of Appeals, 6th Circuit, in the case of *Yaffey* v. *United States,* 276 Fed. 497, and in the cases of *ex parte Brede,* 279 Fed. 147, and *In re Information Migratory Bird Treaty Act,* 281 Fed. 546. In the last cited case, leave to file an information was denied.

The case of *United States* v. *Quaritius, supra,* is cited in a lengthy annotation titled "Leave of Court to File Information" in 120 A.L.R. 358, at P. 361. Following the citation of this case and others, the annotator quotes from the case of *Albrecht* v. *United States,* 273 U. S. 1, 47 S. Ct. 250, 71 L. Ed. 505, as follows:

> "It was said in Albrecht *v.* United States (1927), 273 U. S. 1, 71 L. Ed. 505, 47 S. Ct. 250: 'The information was filed by leave of court. Despite some practice and statements to the contrary, it may be accepted as settled that leave must be obtained, and that before granting leave the court must in some way satisfy itself that there is probable cause for the prosecution.' It was further observed that statements in Ryan *v.* United States, (1925; C.C.A. 4th), 5 F. 2d 667, and Miller *v.* United States (1925; C.C.A. 3d), 6 F. 2d 465, that the United States attorney may file informations as of right, were based upon an incidental remark in United States *v.* Thompson (1920), 251 U. S. 407, 413, 414, 64 L. ed. 333, 341, 342, 40 S. Ct. 280, which must be disregarded."

In the case of *De Graff* v. *State,* 2 Okla. Cr. 519, 103 Pac. 538, the opinion quotes Chief Justice Marshall as follows:

> "It is a fundamental principle of American jurisprudence that liberty is too sacred to be taken from an individual, unless probable cause, in the language of Chief Justice Marshall, 'upon some good cause certain, supported by oath.' It cannot be constitutionally

done upon suspicion, hearsay, opinions, or belief. If a warrant of arrest issues upon the belief of the party making the affidavit, it does not rest upon some act certain supported by oath, committed by the party arrested; but it depends alone upon the mental condition of the affiant."

III

Due process requires that there be opportunity throughout the trial to present every available defense.

Among other things due process requires that there be opportunity to present every available defense. *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298.

The crime was alleged to have been committed on October 29, 1944 (R. 17; R. 88, 3-7). The information against Mart was filed October 30, 1944 (R. 20, 22-34). The trial commenced November 20, 1944 (R. 141, 23-27). The defendant was sentenced to the penitentiary on December 2, 1944 (R. 93, 19-34; R. 94, 1-11). No demurrer was filed to the information (R. 141, 10-22). A demand for a bill of particulars was not made (R. 141, 10-34). No motion for a continuance to prepare for trial was filed (R. 141, 10-34). A plea of insanity was not interposed (R. 141, 10-34; R. 142, 1-17; R. 16, 3-34; R. 17, 1-2). An available witness was not placed on the stand although a request for his testimony was made by Mart (R. 75, 26-34; R. 76, 1-17).

On the morning of the incident the wife of the complaining witness had called the appellant a liar and threatened that he would "pay for this" (R. 121, 21-30; R. 122, 7-14). Following this threat Loomis did come to the home of petitioner and started the altercation (R. 76, 20-34; R. 77, 1-17).

Counsel for appellant interposed no material objections to evidence (R. 121-134). The State was permitted to

prove its case by leading questions without objections (R. 122, 15-34; R. 123; R. 124, 1-30; R. 126, 13-34; R. 127; R. 128; R. 129; R. 130; R. 131; R. 132; R. 133; R. 134, 1-9). Proper objection interposed by counsel for petitioner were withdrawn by him (R. 125, 1-17; R. 125, 21-34; R. 126, 1-9). The landlord of one of the main witnesses for the State was permitted to remain on the jury (R. 129, 18-28; R. 145, 12). A motion for a directed verdict made at the close of State's evidence was not renewed at the close of all the evidence even though petitioner asked his counsel to do so (R. 142, 11-17; R. 75, 5-25). No exceptions were interposed to instructions although the same were erroneous and prejudicial (R. 142, 13-17; R. 143, 4-12; R. 134, 30-34; R. 135, 1-10). No motion for a new trial was filed (R. 136, 17-20; R. 141-144). Counsel for Mart said: "• • • I for one am not in favor of putting up to the court propositions of law in behalf of a defendant whom I know in my own mind that I feel are not worthy of the court's attention, and I am not going to burden the court with anything of that kind" (R. 138, 9-14).

It has been shown that no exceptions to the instructions were taken in the Pocahontas County District Court. The petitioner was at his own home (R. 68, 18-23). He had been threatened (R. 122, 7-14). The witness who was injured approached him aggressively (R. 77, 8-17). The jury were instructed as follows:

> "You are instructed that no person by his own unlawful attack can thereby create a necessity for acting in self-defense and thereupon injure the person with whom he seeks the difficulty and then interpose the plea of self-defense. The plea of self-defense is a shield only for those who are without fault in occasioning an altercation" (R. 109, 7-14).

IV

The petitioner was sentenced for a crime which does not exist, assault with intent to commit manslaughter. No such a crime appears in the statutes of the State of Iowa. No common law crimes are recognized in Iowa.

There is no crime in Iowa known as assaul' with intent to commit manslaughter. In Iowa all crimes are statutory, common law crimes not being recognized. Section 694.5 of the Code, 1946, does not include therein such an offense as assault with intent to commit manslaughter. There is a material variance between the crime charged and the judgment and sentence (R. 87, 17-34; R. 88, 1-9; R. 93, 18-34; R. 94, 1-11). The petitioner could not as a matter of law be found guilty of an offense higher than assault with intent to do great bodily injury (R. 87, 17-34; R. 88; R. 89; R. 90; R. 91; R. 92; R. 93, 1-18). He has already served more time than any sentence which could be pronounced for that offense (R. 84, 6-7; R. 148, 1-4; R. 106, 27-34).

The crime of assault with intent to commit manslaughter is not a criminal offense. It is not defined by statute or embraced under the term homicide and the provisions of Chapter 559 of the 1939 Code of Iowa, (Chapter 690 of the 1946 Code of Iowa) nor is it embraced within the terms assaults or within the provisions of Chapter 563 of the 1939 Code of Iowa, (Chapter 694 of the 1946 Code of Iowa) and therefor the alleged offense of assault with intent to commit manslaughter is so vague and uncertain in its terms as to be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Lanzetta v. *State of New Jersey,* 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888;

Goodman v. *Kinkle* (C. C. A. 7) 72 F. (2d) 334;

People v. *Belcastro,* 356 Ill. 144, 190 N. E. 301, 92 A. L. R. 1223;
United States v. *Armstrong,* (D. C.) 265 Fed. 683;
Tozer v. *United* (C. C.) 32 Fed. 917, 4 Inters. Com. Rep. 245;
United States v. *Capital Traction Co.,* 34 App. D. C. 592, 19 Ann. Cas. 68;
United States v. *L. Cohen Grocery,* 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045;
Connally v. *General Constr. Co.,* 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322;
DeJonge v. *Oregon,* 299 U. S. 353, 366, 57 S. Ct. 255, 81 L. Ed. 278, 285;
Herndon v. *Lowry,* 301 U. S. 242, 278, 57 S. Ct. 732, 81 L. Ed. 1065, 1085.

The crime of which petitioner was convicted forbids no specific or definite act, and leaves open to widest conceivable inquiry the elements embraced, and the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against (R. 93, 18-34; R. 94, 1-11).

(Citations *supra.*)

United States v. *Cohen,* 255 U. S. 81, 41 S. Ct. 298, 85 L. Ed. 516, 14 A. L. R. 1045.

The conviction of petitioner for the crime of assault with intent to commit manslaughter was illegal, invalid and unconstitutional as repugnant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States because vague and wanting in a standard of criminality and failed to inform or advise the accused of the accusation against him (R. 87, 17-34; R. 88; R. 89; R. 90; R. 91; R. 92; R. 93; R. 94, 1-11).

(Citations *supra.*)

State ex rel English v. *Ruback* (Neb.) 281 N. W. 607;
State v. *Diamond* (N. Mex.) 203 Pac. 988, 20 A. L. R. 1527;
International Harvester Company v. *Kentucky,* 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284;
Ex parte Andrew Jackson, 45 Ark. 158;
United States v. *Ballard,* 12 F. Supp. 321;
Ex parte Bales (Okla.) 274 Pac. 485;
State v. *Skinner* (Ala.) 101 So. 327;
Griffin v. *State* (Tex.) 218 S. W. 494;
Russell v. *State* (Tex.) 230 S. W. 146;
Brown v. *State* (Tex.) 279 S. W. 837;
Hayes v. *State* (Ga.), 75 S. E. 523;
Hallman v. *State* (Tex.) 18 S. W. (2d) 652.

In Iowa all crimes are statutory, common law crimes not being recognized. To constitute an offense in the nature of a felony it must be under a statute forbidding the act in question and the Courts of Iowa are powerless to try citizens for an offense that is not made a crime by the supreme law-making power of the State.

Neessen v. *Armstrong,* 213 Iowa 378, 239 N. W. 56;
State v. *Campbell,* 217 Iowa 848, 251 N. W. 717, 92 A. L. R. 1176;
State v. *Lamb,* 209 Iowa 132, 227 N. W. 830;
State v. *Dailey,* 127 Iowa 652, 103 N. W. 1008;
Bopp v. *Clarke,* 165 Iowa 697, 147 N. W. 172;
Estes v. *Carter,* 10 Iowa 400.

A crime is an act committed in violation of a public law forbidding it and to constitute an offense under a statute the act must be one which falls within the definition of either a felony or a misdemeanor. It goes without argument that in Iowa all crimes are statutory, recognition not being given to crimes known at common law. Under the rule rec-

ognized construction, criminal statutes in Iowa must be construed strictly and are not to be extended by construction to include any offense not clearly within the scope of the language employed. (Authorities *supra.*)

Chapter 559 of the 1939 Code of Iowa (1946 Code Ch. 690) deals with homicide including therein the crime of assault with intent to murder. (Section 12195, 1946 Code, Sec. 690.6.) It fixes the punishment for manslaughter in Section 690.10, but does not define the crime itself. Chapter 694 of the 1946 Iowa Code deals with assaults including assault and battery, assault with intent to inflict bodily injury and assault with intent to commit a felony. The crime of assault with intent to commit manslaughter is not defined nor is any reference made to it. It is the theory of the State that Section 694.5 designated as assault with intent to commit a felony embraces the specific offense for which Mart was convicted. Assault with intent to commit manslaughter by the State's reasoning apparently is, inasmuch as manslaughter is a felony by virtue of the punishment designated in Section 690.10, an included offense of assault with intent to commit murder. In other words, there can be an assault with intent to commit a felony, notwithstanding the fact that the felony itself is not defined by statute as a crime.

In *Lanzetta's* case, *supra,* it was ruled that persons are not required at the peril of their life or liberty to speculate, in a criminal proceeding, concerning the meaning of penal statutes, but entitled at all times to be informed of what the State commands or forbids. In that case the New Jersey statute was held to be so vague and uncertain in its definition of the offense, as to be repugnant to the due process clause of the 14th Amendment. The substance of the opinion further held that to be consistent with the constitutional requirement of due process, the terms of a penal

statute creating a new offense should not forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, but must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.

Thomas v. *District of Columbia,* 90 F. (2d) 424;

Johnson v. *Zerbst,* 304 U. S. 458, 58 S. Ct. 1018, 82 L. Ed. 1461;

Weeds v. *United States,* 255 U. S. 109, 41 S. Ct. 306, 65 L. Ed. 537.

Chapter 694 of the 1946 Code of Iowa deals with assaults which could be, or some of them, included offenses in a charge of assault with intent to commit murder. Certainly Section 694.2, 694.3, 694.4 and 694.7 could not apply in this case. That leaves only three other Sections 694.1, Assault and battery, and 694.6, Assault with intent to inflict bodily injury, with which sections we have no quarrel, as the petitioner has already served more time than the maximum sentences of each (R. 84, 6-7; R. 148, 1-4; R. 106, 27-34). This leaves only one other section and it is the one in which an effort was made to stretch the law by sentencing the plaintiff to five years in the penitentiary under a charge which does not exist by statute, but there is a five year penalty provision under Section 694.5, Assault with intent to commit a felony (R. 93, 18-34; R. 94, 1-11).

In the petition for *habeas corpus* we have somewhat analyzed this section. It provides "where the punishment is not otherwise prescribed." We have shown that under the information herein there was a provision for punishment of any offense of which the petitioner could have been guilty (R. 87-93). We have endeavored to point out that any other construction of this statute would be unconstitutional and void.

The minutes of evidence, if they can be called minutes of evidence, and we say they are not, could be held to show only as a matter of law the offense of assault with intent to inflict bodily injury (R. 89, 13-34; R. 89; R. 90, 1-21).

Section 694.6 of the Code of Iowa, 1946, provides "If any person assault another with intent to inflict a great bodily injury, he shall be imprisoned in the county jail not exceeding one year, or be fined not exceeding $500, or be imprisoned in the penitentiary not exceeding one year."

We have called attention to the record in this case showing the petitioner has now served more than one year in the penitentiary (R. 84, 6-7; R. 148, 1-4; R. 106, 27-34).

There is no evidence in the record which could possibly uphold any contention of assault with intent to commit murder. There is only the bare, confusing, inconsistent and uncertain conclusions of the pleader set out in the paper claimed to be an information (R. 87, 17-34; R. 88; R. 89; R. 90; R. 91; R. 92; R. 93, 1-18).

V

Section 777.18 of the Code of Iowa, 1946, is unconstitutional in that it forbade the petitioner at the trial showing insanity as a defense.

Section 777.18 of the Code of Iowa, 1946, provides:

> "Where the defendant pleads not guilty and proposes to show insanity as a defense, or that he relies on an alibi or that he was at some other place at the time of the alleged commission of the offense charged, he shall, at the time he pleads or at any time thereafter, not later than four days before trial, file a written notice of this purpose, setting forth the names of the witnesses, together with the address and occupation of each, and a statement of the substance of that which the defendant expects to prove by the testimony of each of said witnesses. If the defendant files said notice

less than four days before the case is set for trial, the state, on motion of the county attorney, shall be entitled to a continuance of said cause for not to exceed four days."

The record shows that the petitioner was temporarily insane at the time the alleged crime was committed (R. 13-17). He was given no opportunity to avail himself of this defense (R. 140-144).

American Surety Co. v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A. L. R. 298 (and authorities cited under III).

Please note the affidavit of Mrs. Margaret Mart attached to the petition for writ of *habeas corpus* herein (R. 13-17). At the hearing on the writ of *habeas corpus* we were denied the right to prove these allegations (R. 68; R. 69; R. 70; R. 71).

The petitioner did not know whether he struck Loomis or not. The sheriff testified that petitioner said, "Everything went black before me" (Transcript of testimony). Section 777.18 of the Code of Iowa, 1946, forbade the petitioner at the trial of showing insanity as a defense.

VI

The Petitioner Did Not Have Assistance of Counsel

It is a right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

Canons of Professional Ethics, American Bar Association, Canon 5, Reports of American Bar Association, Vol. 62, 1937, p. 1106.

The petitioner was not represented by counsel within the meaning of constitutional provisions. He did not intelligently waive his constitutional rights. The jurisdiction of the court was lost. The judgment of conviction pronounced by the trial court is void. The petitioner is entitled to be released from imprisonment by *habeas corpus* (R. 3-28).

Johnson v. *Zerbst,* 304 U. S. 458, 58 S. Ct. 1018, 82 L. Ed. 1461.

In the case of *Hawk* v. *Olson,* 326 U. S. 271, 66 S. Ct. 116, 118, 119, 90 L. Ed. 61, this Honorable Court said:

> "When the absence of counsel at a trial was urged as a ground for a federal writ of habeas corpus, we held that in federal courts a felony conviction without benefit of counsel is subject to collateral attack because a violation of the accused's constitutional right to the services of an attorney unless he has intelligently waived that privilege. Johnson *v.* Zerbst, supra, 304 U. S. 467, 468, 58 S. Ct. 1024, 1025, 82 L. Ed. 1461, 146 A. L. R. 357; Walker *v.* Johnston, 312 U. S. 275, 286, 61 S. Ct. 574, 579, 85 L. Ed. 830. The same is true in instances of coercion. Waley *v.* Johnston, 316 U. S. 101, 104, 62 S. Ct. 964, 966, 86 L. Ed. 1302.
>
> "In state prosecutions a conviction on a plea of guilty, obtained by a trick, Smith *v.* O'Grady, 312 U. S. 329, 334, 61 S. Ct. 572, 574, 85 L. Ed. 859, or, after refusal of a proper request for counsel, because of the accused's incapacity adequately to defend himself, Williams *v.* Kaiser, 323 U. S. 471, 472, 65 S. Ct. 363, 364, will not support imprisonment. Such procedure violates the Fourteenth Amendment to the Constitution. See Tomkins *v.* Missouri, 323 U. S. 485, 65 S. Ct. 370; Cochran *v.* Kansas, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453. *That Amendment is violated also*

> *when a defendant is forced by a state to trial in such a way as to deprive him of the effective assistance of counsel.* Powell *v.* Alabama, supra, 287 U. S. 52, 58, 53 S. Ct. 58, 60, 77 L. Ed. 158, 84 A. L. R. 527; House *v.* Mayo, 324 U. S. 42, 65 S. Ct. 517; Compare Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572; Glasser *v.* United States, 315 U. S. 60, 69, 70, 62 S. Ct. 457, 464, 465, 86 L. Ed. 680. . . . " (Writer's italics.)

We now comment upon the case of *Powell* v. *Alabama,* 287 U. S. 45, 53 S. Ct. 58, 77 L. Ed. 158. This case squarely holds the State of Alabama denied due process of law to Powell. The opinion holds attorneys as officers of the court are bound to defend one charged with crime when required to do so by appointment of the court. Here a number of attorneys were appointed. They appeared perfunctorily as did counsel for plaintiff in the trial court. The Supreme Court said that the right of a hearing, as a basic element of due process, includes the right to the aid of counsel. It further held that one charged with crime is as much entitled to assistance of counsel in preparing for trial as at the trial itself.

In numerous cases this Honorable Court in determining whether due process was accorded has frequently stressed the fact that the defendant had the *aid* of counsel.

Glasser v. *United States,* 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680;

Adams v. *United States,* 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268.

In *Adams* v. *United States, supra,* it was held:

> "The right of assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An ac-

> cused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court."

A recent case in the Supreme Court is that of *Rene De Meerleer, Petitioner,* v. *The People of the State of Michigan, Respondents,* decided February 3, 1947, and reported in 329 U. S. 663.

In the case of *People* v. *Williams,* 225 Mich. 133, 195 N. W. 818, the Michigan Supreme Court held the right to have the assistance of counsel is permissive only. An attempt was made to follow the past Michigan Supreme Court decisions instead of *Hawk* v. *Olson,* 326 U. S. 271, 66 S. Ct. 116. In the Supreme Court of the United States in the *De Meerleer* case, the opinion recites:

> "The record indicates that the petitioner was without legal assistance throughout all these proceedings and was never advised of his right to counsel. • • • After reviewing the foregoing facts, the Supreme Court of Michigan determined that the record revealed no deprivation of petitioner's constitutional rights. The court indicated that it had given consideration to the case of Hawk *v.* Olson, 326 U. S. 271 (1945), and the authorities cited therein, but concluded that the rule of the Michigan cases was determinative. See People *v.* Williams, 225 Mich. 113, 195 N. W. 818 (1923). In this there was error."

In addition to the case of *Hawk* v. *Olson, supra,* the Supreme Court of the United States cites as authorities in the De Meerleer opinion the following cases: *Powell* v. *Alabama,* 287 U. S. 45 (1932); *Williams* v. *Kaiser,* 323 U. S. 471 (1945); *Tomkins* v. *Missouri,* 323 U. S. 485 (1945); *White* v. *Ragen,* 324 U. S. 760 (1945); and *Betts* v. *Brady,* 316 U. S. 455 (1942).

We have referred to *Powell* v. *Alabama,* 287 U. S. 45, 77

L. Ed. 158. A Mr. Roddy apparently was employed as counsel for the defendants. This lawyer in question in good faith so stated to the court and other attorneys were appointed to assist him but in the record it was shown that the defendants did not have the assistance of counsel. This violated the due process provision of the Fourteenth Amendment.

In the case of *Williams* v. *Kaiser,* 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398, the Supreme Court of the United States further said:

> "The question whether that federal right has been infringed is not foreclosed here, even though the action of the state court was on the ground that its statute requiring the appointment of counsel was not violated."

In the case of *Betts* v. *Brady,* 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595, the sixth syllabus of the opinion is:

> "Asserted denial of due process of law is to be tested by an appraisal of the totality of facts in a given case."

The case of *Smith* v. *O'Grady,* 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859, is cited. There, there was an allegation of failure to appoint counsel "But averred other facts which, if established, would prove that the trial was a mere sham and pretense, offensive to the concept of due process." Further in the opinion it is stated that while the Sixth Amendment lays down no rule for the conduct of the states, "The question recurs whether the constraint laid by the amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment."

By reason of the recent pronouncements of the Supreme Court of the United States the right to have the assistance of counsel and the law in relation thereto under these and other decisions makes applicable the rule of *stare decisis.*

Judge Schwellenback in the case of *Voight* v. *Webb,* 47 F.

Supp. 743, 746, said, "I am not here concerned with the question of the guilt or innocence of the petitioner"; that "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty." Judge Schwellenback quotes with approval from *Palko* v. *Connecticut*, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288, "The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Conclusion

Iowa, like some other States, seemingly is reluctant to follow recent decisions of this Honorable Court. The trial court in Lee County, Iowa, refused even to permit petitioner to introduce evidence or show he was imprisoned in violation of the Constitution of the United States (R. 29-87). The Supreme Court of Iowa, when appealed to, did not even comment upon the various contentions raised, excepting by concluding that due process of law was not violated (R. 162, — Iowa —, 30 N. W. 2d 305).

We feel that this situation is analogous to the one in Michigan where the Supreme Court of that State refused to follow *Hawk* v. *Olson*, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 61. Due process of law we contend, has been and probably will be denied in Iowa if convictions based upon an information as in this case and upon the denial of rights as is shown herein are upheld.

Respectfully submitted,

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